88-1419

Supreme Court, U.S.
FILED
FEB 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RICHARD LAFFERTY

Petitioner,

vs.

ALYESKA PIPELINE SERVICE COMPANY,
FLUOR ALASKA, INC.
and NANA SECURITIES, or
JOHN DOE 1,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA

Richard Lafferty
208 N.W. 4th Ave.
Gainesville, FL 32601

QUESTIONS PRESENTED

1. Lafferty's complaint was dismissed without notice and without hearing and without opportunity to defend.

2. Lafferty was denied the equal protection of the laws by the appellate court and the lower court.

3. Lafferty was deprived of property without due process of law by the appellate court and the lower court.

LIST OF PARTIES

All parties to this action are stated in the caption.

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No authorities are cited.

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There is no report of the opinion below.

GROUNDS FOR JURISDICTION

The denial of due process of law, the denial of the equal protection of the laws, and the taking of property without due process of law.

Date of judgment: November 9, 1988.

Date of denial of petition for rehearing: November 30, 1988.

Jurisdiction is founded on sections one and two of article three of the United States Constitution, and also on amendments five and fourteen of that Constitution, and also on section 1257(3) of the United States Code, chapter twenty eight.

CONSTITUTIONAL PROVISIONS

1. Fifth Amend., U.S. Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Fourteenth Amend., U.S. Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Art. 1, Sec. 1, Alaska Constitution:

Inherent rights. This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

4. Art. 1, Sec. 7, Alaska Constitution:

Due process. No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed.

5. Art. 1, Sec. 16, Alaska Constitution:

Civil suits; trial by jury. In civil cases where the amount in controversy exceeds two hundred fifty dollars, the right of trial by a jury of twelve is preserved to the same extent as it existed at common law. The legislature may make provision for a verdict by not less than three-fourths of the jury and, in courts not of record, may provide for a jury of not less than six or more than twelve.

STATUTORY PROVISIONS

Chapter 28 U.S.C. Section 1257(3):

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court.

(3) By writ of *certiorari*, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

SYNOPSIS OF CASE

Defendant attorney for Alyeska Pipeline Service Co. (Alyeska) posited a fictitious trial as a bar to the original complaint and by means of this tactic was successful in having the complaint dismissed.

When plaintiff Lafferty filed a 60b motion to have this judgment set aside on the basis of fraud upon the court, Alyeska hired new defendant attorneys to defend the original defendant attorney from the charges. These new attorneys defended on the basis that the original defendant attorney had acted in good faith when positing the fictitious trial, and, on appeal, the appellate court affirmed on the basis that the original attorney indeed had acted in good faith. The rationale was that at the time the original defendant attorney had posited the fictitious trial he had in good faith believed the trial existed and that he had made a good faith presentation to the judge. These defendant attorneys used this same good faith argument in persuading the Supreme Court to deny *certiorari*, and, they were successful.

Not known to the appellate court or to the Supreme Court or to plaintiff Lafferty was that the defendants were withholding from the court material and pertinent evidence which completely destroyed the good faith defense.

Knowing that the decision of the appellate court could not be sustained in light of the newly discovered evidence that the defendants had withheld material and pertinent evidence from the appellate court and had represented to that court the opposite of what that evidence would have shown, making impossible the finding that the original defendant attorney had acted in good faith, plaintiff Lafferty petitioned the appellate court for a bill of review to have them review their own previous decision in the matter.

Without stating why, the Chief Justice of the court dismissed the petition without prejudice to the filing of an appropriate action in the superior court. This plaintiff Lafferty did, filing an independent action, and incorporating as an integral part of that complaint, the very same petition for leave to file a bill of review that he had filed in the appellate court.

Without noticing Lafferty to submit pleadings beyond the complaint, the lower court dismissed the complaint with prejudice on a 12b6 motion submitted by defendants.

Lafferty appealed this dismissal as a violation of due process because there was no notice and there was no hearing, and because the judge dismissed the complaint because no pleading in opposition had been submitted to the motion to dismiss, and such pleading is not permissable under the Alaska Rules without special order of the judge and the judge made no such order. Nor did the judge give notice that he was planning to make a decision in a manner not provided by the rules.

The appellate court affirmed the judge below, and thus, I, Lafferty, am now making this petition for *certiorari*.

The above is the essence of the pleadings germane to this petition.

Previous to discovering that defendants had withheld evidence from the court, Lafferty did attempt to file a subsequent action in both the federal court and in the state court. In both attempts he failed and in both attempts he did not directly attack the validity of the decision of the appellate court, but rather filed these subsequent actions on different legal theories, one of which was that, a complaint dismissed on the basis of a fictitious trial that is later admitted to be fictitious cannot be on the merits, as there can be no decision based on the merits of a trial that does not exist.

Petitioner Lafferty raised the question of due process in his brief to the appellate court.

The second paragraph of his conclusion in his brief to that court, page 36, reads as follows:

"The court may not *sua sponte* decide to dispense with the required hearing on a Rule 12(b)(6) motion without noticing the plaintiff and then proceed to make a determination on the motion to dismiss, as such dismissal is a denial of due process."

The appellate court affirmed the lower court in dismissing the complaint without notice and without hearing and without opportunity to defend.

Petitioner Lafferty also raised the issue of due process of law in his petition for rehearing.

The appellate court denied the petition for rehearing.

DENIAL OF DUE PROCESS OF LAW
(First reason for granting the writ)

Lafferty's complaint was dismissed without notice, without hearing, and without opportunity to defend.

Defendant Alyeska had moved for dismissal on a Rule 12b6 motion and by the terms of the Alaska Rules Lafferty was prohibited from submitting a pleading in opposition to the motion. Neither Lafferty nor the defendant moved to bring on the motion for hearing before trial and, because of this, Lafferty expected to defend from the motion at trial.

Instead of this, the judge decided to decide the issue before trial even though there was no motion by either party to do so; and the judge did not inform either party that he was planning to decide the issue before trial. The judge made no order to submit an answer to the 12b6 motion and Lafferty could not submit an answer to the 12b6 motion without order of the judge, as to do so was prohibited by the Alaska Rules.

Thus Lafferty had no opportunity to defend, and absence of such opportunity is denial of due process of law.

DENIAL OF EQUAL PROTECTION OF THE LAWS
(Second reason for granting the writ)

No fair-minded and reasonable man could say the result would have been the same if the position of the parties had been reversed, so that Alyeska were the complainant and Lafferty were the defendant.

1. The appellate court refused to allow Lafferty to ask the judge why he had dismissed the complaint.

2. The appellate court gave implicit approval to the question that Lafferty specifically stated he would be presenting for review, but once Lafferty's brief was in, they withdrew that approval.

3. The appellate court looked with favor on the lower court dismissing Lafferty's complaint without hearing and without giving Lafferty opportunity to defend.

4. The appellate court denied Lafferty's request to be given time to secure the services of a professional attorney before passing judgment on the case, so Lafferty might have opportunity to avoid what Lafferty believed to be an institutional hostility to *pro se* litigants by the Alaska Court System.

5. The appellate court denied Lafferty's motion to strike Alyeska's brief.

6. The appellate court denied Lafferty's motion to be given time and space to brief the issue of *res judicata*.

7. The appellate court denied Lafferty's petition for rehearing.

By the nature of the result on these seven issues it demonstrates unequal treatment.

Lafferty raised the issue of unequal treatment in his letter to Chief Justice Rabinowitz dated December 31, 1987 and in his letter to Chief Justice Matthews dated September 29, 1988.

TAKING OF PROPERTY WITHOUT DUE PROCESS (Third reason for granting the writ)

Lafferty has paid to the defendants over $5,000 in attorney fees and in his complaint he requested that these fees be returned.

Since the expectation of having these attorney fees returned was a reasonable expectation and since his complaint was dismissed without notice or hearing or opportunity to defend, it amounts to taking property without due process.

Additionally, the appellate court itself assessed on Lafferty an additional $750 in attorney fees which, considering they affirmed a dismissal in which neither notice or hearing or opportunity to defend was given to Lafferty, the assessing

of these attorney fees on Lafferty amounts to taking Lafferty's money without due process.

Lafferty also had property in the case itself and to affirm an unconstitutional dismissal in which there is no notice or hearing or opportunity to defend is to take this property from him without due process of law.

CONCLUSION

The complaint was dismissed without notice and without hearing and without opportunity to defend.

Notice and hearing and opportunity to defend are the essence of due process.

The constitutions of Alaska and the United States mandate that no one be deprived of life, liberty, or property, without due process of law.

The constitutions of Alaska and the United States do not say it's OK if one or two people are deprived of due process; on the contrary, it is clear by the wording of these constitutions that the guarantee of due process reaches to and applies to everyone.

Where a person has been deprived of due process it is reviewable. And it is unthinkable that it not be reviewed, otherwise the due process goes unenforced.

APPENDIX

THE SUPREME COURT OF THE STATE OF ALASKA

RICHARD LAFFERTY, *Appellant*,	SUPREME COURT NO. S-2403
v.	NO. 429
ALYESKA PIPELINE SERVICE COMPANY, et al., *Appellees*.	NOVEMBER 9, 1988

Entered pursuant to Appellate Rule 214.

Appeal from the Superior Court of the State of Alaska, 3rd Judicial District Anchorage, Douglas J. Serdahely, Judge.

Appearances: Richard Lafferty, *Pro Se*, Gainesville, Florida, for Appellant. Robert I. Shoaf, Lawrence R. Trotter, Anchorage, for Appellees.

Before: Matthews, Chief Justice, Rabinowitz, Burke, Compton and Moore, Justices.

MEMORANDUM OPINION AND JUDGMENT

I. FACTS AND PROCEEDINGS

This is Mr. Lafferty's third appeal to this court on the same issue. Originally, Lafferty sued Alyeska Pipeline Service Company alleging invasion of privacy, trespass to chattels, false imprisonment and defamation. Judge Victor D. Carlson granted Alyeska's summary judgment motion on all counts and dismissed Lafferty's claim with prejudice. Lafferty did not appeal this judgment.

Seventeen months later, Lafferty moved to set aside the dismissal pursuant to Civil Rule 60(b)(6) alleging that counsel

for Alyeska had committed a fraud upon the court. Judge Carlson denied the motion in July of 1982. This court affirmed that decision in *Lafferty v. Alyeska* Pipeline Service Co., MO&J No. 32 (AK, June 15, 1983). The United States Supreme Court subsequently denied Lafferty's writ of *certiorari*.

In June 1984, Lafferty again sued Alyeska, this time in U.S. District Ct., alleging essentially the same causes of action. Judge Fitzgerald dismissed Lafferty's claim on the grounds of *res judicata*. The Ninth Circuit affirmed.

Lafferty then re-filed his case in the state court essentially alleging the same causes of action as his first two suits. Judge Joan M. Katz dismissed Lafferty's complaint on the grounds of *res judicata* and the statute of limitations. On April 29, 1987, we issued a short Memorandum Opinion & Judgment summarily affirming Judge Katz' dismissal of Lafferty's claims. *Lafferty v. Alyeska Pipeline Service Co.*, MO&J No. 337 (AK, Apr. 29, 1987).

On June 30, 1987, Lafferty filed a new complaint which he deemed an independent action. The new complaint raised the same issues and sought the same relief as the earlier filings, i.e., vacation of the 1977 judgment because of an alleged fraud on the court. However, the new claim purports to be based on newly-discovered evidence constituting the "smoking gun" as to the fraud claim.[1]

Alyeska moved to dismiss the action based upon *res judicata*, asserting that the complaint was duplicative of those previously filed and dismissed on prior occasions. Lafferty did not oppose Alyeska's motion. On August 26, 1987, the court granted the motion and dismissed Lafferty's complaint with prejudice. Lafferty appeals.

II. ANALYSIS

Lafferty asserts that it was error for the court to dismiss his complaint under Civil Rule 12(b) because he did not submit a pleading in opposition to the defendant's motion. However, there is no reason to believe that Judge Serdahely dismissed Lafferty's complaint for this reason.

Lafferty's complaint was properly dismissed on the merits because his present complaint is the same as his prior complaints and it must be dismissed for the same reason, *res judicata*. His alleged "smoking gun" evidence does not establish Alyeska's fraud on the court,[2] and there is nothing in the record suggesting that the evidence was of such a nature that it could not have been discovered at an earlier date through the exercise of due diligence. *See, e.g.*, AK.R.C.P. 60(b)(2).

We have examined each of appellant's arguments and find them to be without merit. The judgment of the superior court is, therefore, AFFIRMED.[3]

ORDER

Pursuant to Appellate Rules 508(e) and (f)(1), attorney fees of $750.00 are awarded to appellee and the appellee shall serve and file with this court an itemized and verified cost bill by 11-21-88. Entered by direction of the Court. Dated 11-9-88.

FOOTNOTES:

1. The so-called "smoking gun" is a letter from Alyeska's attorney to the arbitrator in the initial case. *See infra* note 2.

2. The document relied upon by Lafferty is a letter written to the arbitrator by Alyeska's attorney prior to arbitration specifically *opposing* Lafferty's request to withdraw from arbitration those issues concerning the propriety of Alyeska's search procedures. Alyeska's attorney took the alternative positions that (1) the request to withdraw was "inapposite" because the language of the grievance submitted to the arbitrator did not appear to place the search procedures at issue, and (2) such search procedures are, in any case, subject to arbitration under the Trans-Alaska Pipeline System Agreement. It does not seem patently fraudulent for a subsequent Alyeska attorney to conclude, after reviewing the arbitrator's final decision, that the arbitrator had accepted the second argument rather than the first, and opted to consider the propriety of the search procedures in rendering his decision.

3. Subsequent to oral argument, Lafferty brought a motion to postpone the decision on appeal. Lafferty asserted that he needed time to obtain the assistance of counsel. The motion was denied.

THE SUPREME COURT OF THE STATE OF ALASKA

RICHARD LAFFERTY, *Appellant*,	SUPERIOR COURT NO. 3AN 87-6352 CIVIL
v.	SUPREME COURT NO. S-2403
ALYESKA PIPELINE SERVICE COMPANY, et al., *Appellees*.	

ORDER

On consideration of the petition for rehearing, filed on November 18, 1988,

IT IS ORDERED:

The petition for rehearing is denied.

Entered by direction of the court at Anchorage, Alaska on November 30, 1988.

DAVID A. LAMPEN
Clerk of the Supreme Court